United States Court of Appeals

for the Second Circuit

APPELLEE'S APPENDIX

75-2146

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

EDWARD H. HARNED, JR.,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent-Appellee.

----------X

APPELLEE'S APPENDIX

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee
Office and P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-4178

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RALPH L. McMURRY
Assistant Attorney General
Of Counsel

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA ex rel. EDWARD H. HARNED, JR.,

Petitioner,

-against-

R.J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

Respondent.

----------X

APPLICATION FOR RENEWAL

No. 73-C-1103

STATE OF NEW YORK)
COUNTY OF CAYUGA) ss.:

TO THE HONORABLE ORRIN G. JUDD, UNITED STATES DISTRICT JUDGE:

SIR:

Pursuant to an Order of this Court, dated June 26, 1974, the above entitled petition was dismissed for failure to exhaust state remedies without prejudice to renewal if further post conviction proceedings in the New York State Courts were unsucessful.

On July 23, 1974 petitioner filed a motion to vacate the judgment of conviction with the Nassau County Court. (annexed hereto as Exhibit A*). The District Attorney of Nassau County opposed the aforesaid motion by an Affidavit dated August 6, 1974. (annexed hereto as Exhibit B). The petitioner replied

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* The Minutes of Adjourned Sentence, dated August 20, 1971, is submitted herewith. The petitioner's copy of Dr. J. Martin semer's letter is in such poor condition that photocoping produces an unreadable product.

by an Affidavit dated August 20, 1974. (annexed hereto as Exhibit C). The Nassau County Court denied the aforesaid motion by an Order dated November 14, 1974. (annexed hereto as Exhibit D). The Appellate Division, Second Department denied leave to appeal by an Order dated January 28, 1975. (annexed hereto as Exhibit E). The petitioner has just been informed by the Court Of Appeals that there is no appeal to that Court from such an Order of the Appellate Division, citing CPL Sections 460.15, 460.20, and 450.90.

Thus, the specific issue has been presented to the Courts of New York State and each court has had the opportunity to review the specific issue; the petitioner's state remedies have been exhausted.

WHEREFORE, the petitioner respectfully prays that this Court will renew the above entitled petition for a writ of habeas corpus.

Respectfully submitted,

Edward H. Harned, Jr.

Edward H. Harned, Jr., pro se
NYSIIS # 1018662H
Auburn Correctional Facility
A.C.F. # 64067
135 State Street
Auburn, New York 13021

Subscribed And Sworn To Before Me
This 28th Day Of February, 1975.

Elaine A. Graves
Notary Public

ELAINE A. GRAVES
Notary Public, State of New York
Cayuga County #1436
My Commission Expires March 30, 19 75

COUNTY COURT, NASSAU COUNTY

PEOPLE OF THE STATE OF NEW YORK,

-against-

EDWARD H. HARNED, JR.,

DEFENDANT.

NOTICE OF MOTION

STATE OF NEW YORK)
COUNTY OF CAYUGA) ss.:

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of EDWARD H. HARNED, JR. duly sworn to the 23rd day of July, 1974, and upon the accusatory instrument and all the proceedings heretofore had herein, a motion will be made in the County Court of Nassau County, Part ____ thereof, at the Courthouse located at Mineola, New York, on the ____ day of _____, 1974 at _____ o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order vacating the judgment heretofore entered against the above named defendant on the 19th day of January, 1972; or, in the alternative, for an order for a hearing to determine whether such judgment should be vacated, on the following grounds: CPL Section 440.10 subd. 1 (h); and for such other and further relief as to the court may seem just and proper

Yours, etc.

Edward H. Harned Jr.
Edward H. Harned, Jr., pro se
NYSID # 101 2602

Subscribed and Sworn To Before
Me This 23rd day Of July, 1974

Elaine A. Gibson
Notary Public

ELAINE A. GIBSON
Notary Public, State of New York
Cayuga County #1413
My Commission Expires March 30, 1975

EXHIBIT A

COUNTY COURT NASSAU COUNTY

PEOPLE OF THE STATE OF NEW YORK,

-against-

EDWARD H. HARNED, JR.,

DEFENDANT.

AFFIDAVIT IN SUPPORT

STATE OF NEW YORK)
COUNTY OF CAYUGA) ss.:

EDWARD H. HARNED, JR., being duly sworn, deposes and says that:

I am the defendant herein and make this affidavit in support of a motion to vacate judgment of conviction upon the ground that it was obtained in violation of rights of the defendant under the Constitution of the United States, as provided for by Section 440.10 subd. 1 (h) of the Criminal Procedure Law.

FACTS

On January 27, 1970 the defendant was indicted for the crimes of Rape in the First Degree, Sodomy in the First Degree, Sexual Abuse in the First Degree, and Assault in the Second Degree (Ind. No. 28936). On April 12, 1971 the defendant was indicted for the crimes of Rape in the First Degree, Burglary in the First Degree, and Possession of Burglars Tools (Ind. No. 31363).

On June 23, 1971 the defendant withdrew his pleas of not guilty and entered a plea of guilty to the crime of Burglary in the First Degree under Indictment No. 31363 and in satisfaction thereof and in satisfaction of Indictment No. 28936.

On June 30, 1971, before sentence was imposed, the defendant wrote to the court requesting permission to withdraw his plea of guilty. (Letter, dated June 30, 1971, from Edward H. Harned, Jr., to Frank X. Altimari, Judge).

On August 20, 1971 Joseph C. Petitto, Esq. was appointed counsel to prosecute the defendant's motion.

A hearing on the motion to withdraw the guilty plea was held on October 29, 1971, and the motion was denied with an opinion dated December 23, 1971. Sentence was imposed on January 19, 1972 (indeterminate term of imprisonment not to exceed ten years (Altisuri, J.)). On appeal from the judgment of conviction, the Appellate Division affirmed the conviction. People v Harned, 40 A.D.2d 952, (2d Dept. 1972). Leave to appeal to the Court of Appeals was denied on January 29, 1973. The petition for a federal writ of habeas corpus was denied on June 26, 1974 for failure to exhaust state remedies, without prejudice. United States ex rel. Harned v. Henderson, ____F.Supp. ____, (E.D.N.Y. 73-C1103, Memorandum and Order, June 26, 1974).

CONSTITUTIONAL VIOLATIONS

1. At the time of the indictments and the plea, Section 130.15 of the Penal Law was in effect.

Defendant's letter to Judge Altisuri after his guilty plea stated that he could not account for what happened on January 16, 1971 (Ind. No. 31363), except that he suffered extreme anguish because of the unfounded charges that hung over him for fourteen months on Indictment No. 2[illegible]6. However, the extent of corroborative evidence on Indictment No. 31363 was an important factor in determining the extent of exposure at a trial, (see United States ex rel. Harned v. Henderson, supra.), and is not shown in the record except where Judge Altisuri conceded the total lack of any corroborating evidence by stating that the alleged rape was uncorroborated. (Minutes of Change of Plea, 6/23/71, p.14-15).

2. The factual basis for a plea of guilty must appear on the record. Santobello v. New York, 404 U.S. 257, (1971); see also McCarthy v. United States, 394 U.S. 459, (1969).

Judge Altimari recognized that one of the essential elements of the crime to which the defendant pleaded guilty was missing. Judge Altimari concluded in his opinion of December 23, 1971 that the defendant did not want to admit a forcible rape out of fear of the stigma which might attach. However, since the defendant refused to acknowledge any actual rape or other crime, or causing physical injury to any person, and there was no corroborating evidence to support such a crime, and since the defendant's retained attorneys did not refer to the Boles v. Serrano, 15 N.Y.2d 304, (1965), or North Carolina v. Alford, 400 U.S. 25, (1970) cases in connection with the entry of the plea, to which Judge Altimari relied so heavily, this conclusion is totally without merit and the court did not have an adequate basis for accepting the guilty plea.

The defendant's admissions established only Burglary in the Second Degree, not Burglary in the First Degree. (See United States ex rel. Harned v. Henderson, supra, p.16).

3. Defendant's guilty plea was in part motivated by his lack of confidence in Legal Aid lawyers, his inability to retain other lawyers who would defend him, and the abandonment of his defense by his retained lawyers.

The record shows that Richard C. Scholly did not elect to continue as defense counsel when the defendant refused to cooperate with

his witness. (Minutes of Adjourned Sentence, 8/23/71, p.2-3.)

The record does not show Joseph P. McCarthy's refusal to continue as defense counsel when the District Attorney refused to go along with his wishes because Joseph P. McCarthy refused to appear in the courtroom at anytime after June 23, 1971.

Richard C. Schulz, pursuant to a request to the court by the defendant, stated that both he and Mr. McCarthy would appear at the hearing on the motion to withdraw the guilty plea, but neither attorney was present for the October 29, 1971 hearing. (Minutes of Adjourned Sentence, 8/27/71, p.3). Both attorneys had more knowledge of the state's case on corroboration of Indictment No. 31763 than appears in the record but a further hearing in this court may be necessary to explore this area, with these attorneys as witnesses, as recommended by United States ex rel. Barnes v. Henderson, supra, p.17.

4. At the time of the change of plea, the defendant's attorneys were trying to obtain a trial date for Indictment No. 28,956, and not engaged in plea bargaining.

The District Attorney's threat to the defendant that he would try the latter indictment first so that the defendant's defense would be shattered on the trial of the earlier indictment and that the defendant would be sentenced to a period of imprisonment of about 11½ years violates the defendant's right to a speedy trial under the Sixth Amendment to the United States Constitution, Santos County's practice of trying indictments in the sequence in which they were handed up, (People v. Fanci, 27 N.Y.2d 418, (1/20/71)), and the Court of Appeals' ruling that such threats are unconstitutional, (People v. Selsky, 26 N.Y.2d 965, (1970).

WHEREFORE, your deponent submits that the aforesaid plea of guilty was obtained in violation of the defendant's rights under the Constitution of the United States, and he moves that, in accordance with Section 440.10 subd. 1(h) of the Criminal Procedure Law the judgment of the Nassau County Court, based upon this plea of guilty, be vacated, and for such other and further relief as law and justice require.

Respectfully submitted,

Edward H. Harned, Jr.
Edward H. Harned, Jr., pro se
NYSID # 101 3662 R

Subscribed and Sworn to Before
Me this 23rd Day Of July, 1974

Notary Public

-5-

COUNTY COURT NASSAU COUNTY

PEOPLE OF THE STATE OF NEW YORK,

-against-

EDWARD H. HARNED, JR.,

DEFENDANT.

MOTION TO VACATE JUDGMENT
SUPPLEMENT

STATE OF NEW YORK)
COUNTY OF CAYUGA) ss.:

EDWARD H. HARNED, JR., being duly sworn, deposes and says that:

I am the defendant herein, and wish this supplement include with my motion to vacate judgment which will be heard on August 12, 1974.

Under Constitutional Violations:

5. The plea of guilty was partly motivated by the confusion of the defendant at the time of the plea of guilty.

The elements of the crime of Burglary were not understood by the defendant at the time of the plea of guilty. (Minutes of Hearing To Withdraw Guilty Plea, 10/29/71, pp. 12, 13.)

The defendant was upset, nervous, and confused during the change of plea, and did not understand questions which were asked by the judge. (Id., pp. 1,-13.)

Additional evidence of the defendant's confusion about courtroom procedure is found in the result of a psychiatric examination of the defendant ordered by Frank X. Altimari on March 12, 1971. (Letter, dated March 24, 1971, from J. Martin Myer, M.D., Chairman, Department of Psychiatry, Nassau County Medical Center, to Frank X. Altimari, Judge, C.J.)

The defendant requests to be present, in the County Court, at all proceedings in this matter, and further moves this Court for the assignment of counsel since the defendant has no material assets with which to pay an attorney's fees.

Service of this supplement is made by filing a true copy of this supplement with the duly authorized Notary Officer of the Auburn Correctional Facility, to be sent, by United States mail to: Hon. William Cahn, District Attorney of Nassau County, 262 Old Country Road, Mineola, New York 11501.

Respectfully submitted,

Edward H. Horned, Jr., pro se
NYSIS # 101 9662
Auburn Correctional Facility
A.C.F. # 64467
135 State Street
Auburn, New York 13021

Subscribed And Sworn To Before
Me This 30th Day Of July, 1974

Notary Public

COUNTY COURT : COUNTY OF NASSAU.

----------x

THE PEOPLE OF THE STATE OF NEW YORK

-against-

EDWARD H. HARNED, JR.,

Defendant.

----------x

INDICTMENT #31363
and #28586

AFFIDAVIT IN
OPPOSITION

STATE OF NEW YORK)
: SS.:
COUNTY OF NASSAU)

M. ARTHUR EIBERSON, being duly sworn, deposes and says:

That he is an Assistant District Attorney of the County of Nassau and submits this affidavit in opposition to defendant's pro se motion, dated July 23, 1974, to vacate the judgment.

That the defendant was indicted January 20, 1970 under Indictment No. 28586 charging Rape, First Degree, Sodomy, First Degree, Sexual Abuse, First Degree, and Assault, Second Degree. The defendant was subsequently indicted March 9, 1971 under Indictment No. 31363, charging Rape, First Degree, Burglary, First Degree and Possession of Burglary Tools. On June 23, 1971, the defendant before the the Hon. Frank X. Altimari, then County Court Judge, pled guilty to the charge of Burglary, First Degree under Indictment No. 31363 in satisfaction of both indictments (Minutes of Change of Plea annexed as Appendix A).

Subsequent to the plea, the defendant moved to withdraw his plea of guilty on the basis that he had been coerced into pleading by his parents and then attorneys, Joseph McCartney, Esq. and Richard Schultz, Esq. As a result of that motion, Judge Altimari ordered a hearing on the question. The hearing was held on October 29, 1971, at which time the defendant and his mother testified. Although the defendant alleged that he had been coerced into pleading by his attorneys, the defendant, who was now

EXHIBIT B

represented by Jospeh C. Bottitta, Esq., did not call Messrs. McCartney and Schultz to testify (Minutes of Hearing annexed as Appendix B).

That on December 23, 1971, Judge Altimari rendered his decision in the hearing, denying the motion to withdraw the plea (Copy of decision annexed as Appendix C). In his decision, Judge Altimari pointed out that the defendant did not want to admit to a forcible rape out of the fear of the stigma which might attach (December 23, 1971 Decision, page 2, paragraph 2). Judge Altimari also stated that while the defendant protested his innocence under Indictment No. 28586, he never did so as to Indictment No. 31363, the indictment containing the charge ofBurglary, First Degree, to which he pled. Moreover, Judge Altimari found that the defendant understood the proceedings and knew what he was doing (December 23, 1971 Decision, page 3).

That the defendant then was sentenced, on Jan. 19, 1972, to a term of imprisonment not to exceed ten years. An appeal was taken from that judgment to the Appellant Division, Second Department. The appeal was solely on the basis of the denial by Judge Altimari of the application to withdraw the plea of guilty. There was, however, no mention of coercion by his former attorneys, Messrs. McCartney and Schultz. On December 27, 1972 the Appellate Division affirmed the judgment of conviction, and on February 1, 1973, the Court of Appeals denied leave to appeal to that Court.

That the defendant then appealed to the federal courts pro se for a Writ of Habeas Corpus. The Hon. Oren Judd, District Court Judge, in an opinion dated June 26, 1974, dismissed the petition for failure to exhaust State remedies, saying that the question of coercion by the defendant's former attorneys should have been raised in the State courts (Copy of opinion annexed as Appendix D).

That the defendant, based on Judge Judd's decision, now moves this Court to vacate the judgment. The defendant now alleges that he pled guilty because of the conduct of his former attorneys. However, he did not when he was afforded a hearing on his motion to withdraw his plea raise the issue nor call these attorneys as witnesses at that hearing. It is to be noted that if they were unwilling to appear voluntarily, he could have subpoenaed them, but he did not. Nor did he raise this issue on appeal when he also could have done so. He does it, rather, for the first time in the federal courts, after a full and complete hearing in the County Court and an appeal to the Appellate Division of the Supreme Court.

That the defendant now also raises the issue that his plea of guilty to the crime of Burglary, First Degree should not have been accepted, due to the fact that all of the elements of that crime were not present in his admission to the Court at the change of plea, namely, the injury to a person other than a participant in the crime. The injury here, of course, was the rape of the complainant. The defendant talks of the lack of corroboration of the rape. However, it is to be noted that this was the very problem in the taking of the plea, as Judge Altimari points out in his decision; the defendant did not wish to be stigmatized with the charge of rape and that was the reason he would only plead to Burglary in the First Degree and not Rape in the First Degree. The minutes of the Change of Plea (page 8) clearly show that when the defendant refused to admit to an attempted rape, he would only admit an intent to rape, and reiterated that position at the hearing on the motion to withdraw the plea (Minutes of Hearing, pages 27 and 28).

That Assistant District Attorney Robert Strauss, who appeared for the People on these cases and who conducted the pre-trial conferences and took the plea in this case, clearly remembers that the only thing that held up the acceptance of an offer to plead was the defendant's wish not to be stigmatized by the admission of guilt of a rape, and when he was offered an opportunity to plead to the crime of Burglary, First Degree, he accepted it. An affidavit to that effect by Assistant District Attorney Strauss is annexed hereto and made a part hereof.

That your deponent submits that a defendant may be allowed to plead guilty while not admitting guilt when the defendant intelligently concludes that his interests require the entry of a guilty plea, and the record before the Judge contains a strong evidence of guilt. North Carolina v. Alford, 400 U.S. 25. Judge Altimari recognized this in his decision, and so did Judge Judd. The record here clearly contains evidence of guilt. The defendant, in open court, admitted to all the elements of Burglary in the First Degree, save injury, and this only because he would not admit the actual rape, for fear of the stigma attached thereto, although he did admit an intent to rape the victim; and clearly, with two years of college to his credit, he was aware of the meaning of intent.

It is quite apparent to your deponent that the defendant is seizing upon the technicality of the omission of the forcible rape in his plea in admitting the Burglary, First Degree charge to effect his purpose. It is to be noted that the defendant was allowed to omit that part of the crime in deference to his desire not to be stigmatized by having to admit an actual rape, while he did admit an intent to commit rape. He now seeks to use the consideration shown him by the Court as a weapon against the Court; this, he should not be permitted to do. The plea was knowingly and

knowledgeably made by the defendant and legally accepted by the Court under the United States Supreme Court decision in North Carolina v. Alford, supra, and after a full hearing on the question.

To now vacate the plea on this unsound basis might possibly prejudice the People to have to try these two cases three and one-half years after the commission of the crime in Indictment No. 31363, and some five years after the commission of the crime in Indictment No. 28586. This, of course, is not to say that prejudice to the People outweighs a possible denial of a defendant's rights. However, the record here clearly indicates that the defendant suffered no denial of his rights. He bargained for what he wanted, the ability to plead guilty without having to admit to a forcible rape, out of fear of the stigma which might attach; and this he got. He was allowed to plead guilty to Burglary in the First Degree and was not required to admit either of the two forcible rapes; in that, he got what he bargained for.

In fact, he got better than he bargained for, inasmuch as Judge Altimari promised a sentence with a maximum of no more than fifteen years (Minutes of Change of Plea, page 10), and imposed a sentence of only ten years maximum.

Finally, it is to be noted that the defendant, in addition to reciting the facts of the burglary (pages 8-9, Minutes of Change of Plea), on Page 12 of the Minutes of Change of Plea, when asked by the Court,

> "Is there any question in your mind that you are guilty of the burglary?"

answered:

> "Of the burglary, no."

WHEREFORE, it is respectfully requested that the instant application be denied in all respects.

[redacted]UR EIBENSON.

Sworn to before me this

6th day of August, 1974.

FAY E. JAGUSIAN
NOTARY PUBLIC, State of New York
No. 30-1950815
Qualified in Nassau County
Term Expires March 30, 19[illegible]

COUNTY COURT : COUNTY OF NASSAU.

----------x

THE PEOPLE OF THE STATE OF NEW YORK — INDICTMENT #31363 and #28586

-against-

EDWARD H. HARNED, JR., — AFFIDAVIT

Defendant.

----------x

STATE OF NEW YORK)
: SS.:
COUNTY OF NASSAU)

ROBERT STRAUSS being duly sworn, deposes and says:

That he is an Assistant District Attorney of Nassau County and submits this affidavit in connection with the defendant's pro se application to withdraw his plea of guilty in satisfaction of the above-captioned indictments entered June 23, 1971.

That he was the Assistant District Attorney to whom these two indictments were assigned for purposes of trial and was at the time of the change of plea engaged in preparing the indictments for trial.

That during the course of these preparations he had several pre-trial conferences with the defendant's attorney. It is your deponent's recollection of these conferences that the defendant was not interested in going to trial on either of these two indictments, but would not plead to any charge which would involve the admission of the crime of rape, the original offer of a plea being to plead to Rape, First Degree, in satisfaction of both indictments. When the People then agreed to accept a plea of guilty to Burglary, First Degree, the "log jam" was broken and the defendant accepted the offer, and in fact, on June 23, 1971 did plead guilty to Burglary, First Degree in satisfaction of both indictments.

That it was quite apparent to your deponent that there never was a question about the defendant pleading guilty, but rather only a desire on the part of the defendant not to be stigmatized by a conviction, by way of plea or otherwise, for the crime of rape.

Robert Strauss
ROBERT STRAUSS.

Sworn to before me this
31st day of July, 1974.

FAY E. JAGUSIAK
NOTARY PUBLIC, State of New York
No. 30-1950215
Qualified in Nassau County
Term Expires March 30, 19__

COUNTY COURT : NASSAU COUNTY

PEOPLE OF THE STATE OF NEW YORK,

-against-

EDWARD H. HARNED, JR.,
DEFENDANT.

INDICTMENT # 31763
28516

AFFIDAVIT IN REPLY

STATE OF NEW YORK)
COUNTY OF CAYUGA) ss.:

EDWARD H. HARNED, JR., being duly sworn, deposes and says that:

I am the defendant herein and submit this affidavit in reply to the District Attorney's Affidavit In Opposition to the defendant's pro se motion to vacate judgment.

The defendant received Mr. Hiberson's affidavit at 9:30 o'clock in the afternoon of August 9, 1974. Consequently, a reply could not have been submitted by August 12, 1974. With the defendant's difficulty in securing typing equipment, the typing of this affidavit was not completed until August 16, 1974, to late, by Auburn Correctional Facility rules, for it to be notarized until today. The defendant prays the Court will accept this affidavit and excuse its tardiness.

Since the defendant's pro se petition for a writ of habeas corpus to the United States Court is a public record, the defendant requests that that application form a part of the record in this Court.

Mr. Hiberson is so engrossed with playing the part of the over-zealous prosecutor that he has missed the point completely.

Mr. Hiberson claims the record contains evidence of guilt; specifically, Burglary, Second Degree, as recognized by the federal

EXHIBIT C

court, (United States ex rel. Harned v. [illegible], (E.D.N.Y. 73-C-1103, June 26, 1974), at p.16),), not Burglary, First Degree with a vital piece missing. A gun without bullets is not a deadly weapon.

At the Hearing To Withdraw the Guilty Plea, 10/20/71, the Assistant District Attorney recognized the defendant's intelligence. (TM p.37). Judge Altimari recognized that the defendant is both "intelligent and articulate". (Opinion of Judge Altimari, 12/27/71, at p.5). Mr. Liberson also recognized this fact in his affidavit at page four. The Court should not be selective in its analysis of defendant's knowledge and intelligence. It should be assumed that the defendant knew what intent and attempt meant.

A plea to Burglary, First Degree, in this case, requires a factual basis for the crime of rape in the first degree; sexual intercourse by forcible compulsion. The record shows no corroborating evidence of force, and Judge Altimari concedes the total lack of any corroborating evidence of sexual intercourse. Mr. Liberson's bald Assertion, that the Court permitted a plea to Burglary, First Degree without admission of the essential element of "physical injury" out of consideration for the defendant, borders on insanity. Christianity ascended because of Luke, not the ailing patient. Judge Altimari knew there was no factual basis for a charge of rape in Indictment No. 31363 and this was the reason he did not pursue inquiry into the "physical injury" element of Burglary, First Degree.

The Minutes of Adjournment Sentence of August 20, 1971, at page three, show that the defendant made an oral request to the Court to have his former retained counsel present for examination at any hearing in the plea withdrawal proceedings. However, Mr. Liberson, once again, has missed the point.

The federal court suggested that the defendant's former retained counsel "may have had more knowledge concerning the strength

of the state's case on corroboration of the second [illegible] than appears in the record." (United States ex rel. Harned v. Henderson, supra, at p.17). What appears in the record is the defendant's testimony that he pleaded guilty under the advice of counsel, (Minutes Of Hearing To Withdraw Guilty Plea, 10/22/71, pp. 11-16), and answered questions without understanding their legal implications, (Id., p.11), or knowing the elements involved in burglary, (Id., pp.12, 40), because he "had no choice", (Id., pp.15, 21), and with regard to the second indictment, "In that case, I had no defense.", (Id., p.23). Clearly, this defendant was confused and unknowing about the extent of evidence at a trial, and did not "intelligently conclude that his interests require[d] entry of a guilty plea", North Carolina v. Alford, 400 U.S. 25,37 (1970). (See Boykin v. Alabama, 411 U.S. 238, (1969); C.f. United States ex rel. Dunn v. Henderson, 494 F.2d 307 (2d Cir. 1974)).

The affidavit of Robert Strauss, annexed thereto, is inconsistent with the record.

Although the defendant had a number of conferences with his counsel, Richard C. Schulz's last letter to him, a few weeks before the guilty plea, stated that he was trying to get in a trial date, and not that he was engaged in plea bargaining. (Letter, dated June 11, 1971, from Richard C. Schulz, Esq., to Edward J. Harned, Jr.). This fact was recognized by the federal court. (United States ex rel. Harned v. Henderson, supra, at pp.3-4).

At the hearing to withdraw the guilty plea, the defendant's mother testified that the defendant's parents "couldn't do any more for him", (MH pp.5, 8), meaning that with defendant's father terminally ill, there was no more money for a lawyer since the defendant was disgusted with the way his lawyers were handling his cases.

Mr. Strauss suggests that the defendant did not want a trial on either indictment. However, defendant's pro se application to withdraw the guilty plea states, most strongly, that the defendant did want a trial on the earliest indictment. (Letter, dated June 30, 1971, from Edward H. Harned, Jr., to Frank X. Altimari, Judge). Judge Altimari recognized the defendant's desire for a trial at the hearing to withdraw the Guilty Plea, 10/29/71, p.14. The defendant's pro se petition for a writ of habeas corpus to the federal court clearly articulated the defendant's overwhelming desire for a trial.

Mr. Strauss suggests that the defendant would not plead to <u>any charge</u> which would involve the admission of the crime of rape, but Mr. Strauss does not indicate a reference to a specific indictment. It should be noted that pleading to Burglary, First Degree, in this case, would involve the admission of the crime of rape, or attempt thereof.

Mr. Strauss obviously in trying to cover-up his greed for forcing a plea to <u>any charge</u> which would result in the non-acquittal disposition of both indictments, especially since a favor to one influential could only help his political career. This greed is apparent by the facts that he resorted to unconstitutional threats against the defendant to secure this end, and that he was so ravenous for this plea that he failed to consider the legal implications of <u>First Degree</u> Burglary.

WHEREFORE, it is respectfully requested that the instant application be granted.

Edward H. Harned, Jr.
Edward H. Harned, Jr., pro se

Subscribed and Sworn To Before
Me This 20th Day Of August, 1974.

Elaine A Graves
Notary Public

Notary Public, State of New York
My Commission Expires [illegible] 19 75

SHORT FORM - 1eR

COUNTY COURT — NASSAU COUNTY
SPECIAL TERM: PART I

Present:
Hon. [illegible] TOWSON
County Judge

Motion Cal. # [illegible]
Indictment # [illegible]

PEOPLE OF THE STATE OF NEW YORK

—against—

EDWARD H. HARNED, JR.,

Defendant

HON. WILLIAM CAHN
District Attorney
Nassau County
Mineola, New York

EDWARD HARNED, JR., PRO SE
155 State Street
Auburn, New York, 13021

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause	
Supporting Affidavits	
Answering Affidavits	
Reply Affidavits	
Affidavits/Exhibits	
Filed Papers	

Briefs: People's Petitioner's Defendant's Respondent's

The foregoing papers numbered 1 to having been read on this motion

The defendant, pro se, applies to this court for an order vacating the judgment convicting him of Burglary in the First Degree on the ground that his plea of guilty was improperly obtained and upon his prompt request he should have been permitted to withdraw it. (CPL 440.10 (subd. 1 (b) and (h))).

The defendant entered a plea of guilty to Burglary in the First Degree on June 23, 1971. Shortly thereafter the defendant applied to withdraw his plea. After a full hearing this application was denied. Court records indicate that an appeal was taken from this conviction in 1972. Thus, either the ground now raised was previously determined upon the merits upon such appeal (CPL 440.10 (subd. 2 (a))), or is currently appealable (CPL 440.10 (subd. 2(b))), or, although sufficient facts appeared upon the record to have

EXHIBIT D

permitted review upon an appeal, the defendant unjustifiably failed to raise the issue (CPL 440.10 (subd. 2 (c))). In any event, this application must now be denied. (CPL 440.10 (subd. 2)).

Therefore, the application is denied.

SO ORDERED.

ENTER

GRANTED

Dated November 14, 1974

HAROLD W. McCONNELL

JCC

ENTERED

NOV 18 1974

HAROLD W. McCONNELL
COUNTY CLERK OF NASSAU COUNTY

PLEASE TAKE NOTICE THAT: The petitioner be and is hereby advised of his right to apply to the Appellate Division, Second Department for a certificate granting leave to appeal from this determination and upon proof of his financial inability to retain counsel and to pay the costs and expenses of the appeal, petitioner may apply to the Appellate Division for the assignment of counsel and for leave to prosecute the appeal as a poor person and to dispense with printing. Such application for poor person relief will be entertained only if, as and when such permission or certificate is granted. 22A NYCRR Section 671.5.

Dated November 14, 1974

BERNARD TOMSON

JCC

APPELLATE DIVISION : SUPREME COURT
SECOND JUDICIAL DEPARTMENT

BEFORE: HON. ARTHUR D. BRENNAN , Associate Justice.

THE PEOPLE, etc.,

Plaintiff,

v. : Order

EDWARD H. HARNED, JR.,

Defendant.

In the above entitled cause, the above-named Edward H. Harned, Jr. , defendant, having moved in this court for leave to appeal thereto from an order of the County Court, Nassau County, dated November 14, 1974 ; and this court, by order dated January 28, 1975 , having referred said application to me for determination;

NOW, upon the papers filed in support of said application, ~~xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~ and there being no opposition thereto; said application having been duly submitted; and due deliberation having been had thereon; it is:

ORDERED that the said application for leave to appeal to this court is hereby denied.

Dated, Brooklyn, N. Y.
January 28, 1975

Arthur D. Brennan

Hon. Arthur D. Brennan,
Associate Justice, Appellate Division,
Supreme Court, Second Judicial Department.

EXHIBIT E

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Ralph McMurry, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for respondent-appellee herein. On the 19th day of March, 1976, he served the annexed upon the following named person :

Jeffrey Ira Zuckerman
48 Wall Street
NY NY
10005

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Ralph J McMurry

Sworn to before me this
19th day of March, 1976

Joan R Scannell
Assistant Attorney General
of the State of New York